



January 18, 2006

Comments of the
International Foodservice Distributors Association
On the
Notice of Proposed Rulemaking Implementing the
Telephone Consumer Protection Act of 1991
Before the
Federal Communications Commission

The International Foodservice Distributors Association (IFDA) appreciates the opportunity to comment on the FCC's proposed regulations implementing the Junk Fax Prevention Act (JFPA) of 2005. IFDA strongly supported passage of this legislation to restore the established business relationship (EBR) exemption and allow businesses to continue sending faxed commercial messages to their customers without first obtaining written permission.

IFDA is a Washington, D.C. based trade organization representing foodservice distributors throughout the U.S., Canada, and internationally. IFDA's 130+ members include broadline, systems, and specialty foodservice distributors that supply food and related products to restaurants, institutions, and other food away from home foodservice operations. IFDA members operate more than 550 facilities, and sell more than \$75 billion in food and related products to the fastest growing sector in the food industry.

IFDA member companies use the facsimile to transmit a wide variety of information. Much of what distributors sell to restaurants and other customers is perishable product such as produce and meat. Prices can vary day to day or week to week, and companies often use faxes to communicate timely pricing information to customers. In addition, many independent restaurant customers purchase from a variety of vendors or frequently switch suppliers, meaning distributors are continually communicating with current

or recent past and prospective future customers through price lists and marketing materials. While email is becoming a more common tool, a distributor's customers often spend more time in the kitchen preparing meals than in their office, making the fax a more effective means of communication. As with any business, however, distributors do not wish to anger their customers and thereby endanger the opportunity for future sales. Therefore, distributors make every possible effort to comply when a customer or potential customer requests not to receive faxed communications.

The Telephone Consumer Protection Act of 1991 (TCPA) prohibits the sending of unsolicited faxed advertisements. In the regulations implementing the law, however, the Commission established an EBR exemption to allow businesses to communicate with their customers without obtaining prior permission. In July 2003, the FCC reversed this determination and issued rules eliminating the EBR exemption for unsolicited facsimile advertisements. The passage of the JFPA was necessitated by these changes to the regulations. IFDA believes the legislation achieves a fine balance, allowing companies to continue to fax their customers under an unlimited EBR exemption, while increasing consumer protections by requiring opt-out language to allow recipients the ability to remove themselves from future fax lists.

Despite the passage of TCPA almost fifteen years ago, unsolicited faxed advertisements continue to clog fax machines at an alarming rate. IFDA like every other business receives more than our fair share every day. It is IFDA's experience, however, that virtually all of these unsolicited faxes are received from individuals or companies without any claim to an EBR exemption and are therefore illegal as they have been since the enactment of the TCPA in 1991. It is not at all clear from the legislative and regulatory history of this issue that faxes sent under the EBR exemption are contributing to this problem.

The lack of a clear connection between the EBR exemption and the problem of unsolicited faxes has been a primary issue of concern for IFDA throughout the legislative discussions regarding the JFPA and continuing into the NPRM itself. While the FCC continues to receive numerous complaints regarding unsolicited faxes, the Commission has failed to provide evidence regarding the number of complaints that arise from companies faxing under the EBR exemption. IFDA believes that until more information is available to determine the extent of this problem, the FCC should take a very guarded approach to regulation, particularly with regard to the question of a time limit for the EBR exemption.

On this issue it is worth noting that Congress considered and rejected the notion of an EBR time limit. As the FCC notes in this rulemaking, however, the JFPA does authorize the Commission to revisit the issue of whether to place a time limit on the EBR exemption after evaluation of complaint data received. The Commission then pledges to “determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements...” IFDA is deeply concerned that the FCC is asking for comment regarding a time limit before it has done this analysis. In our view the Commission has exceeded its statutory authority by raising the question of an EBR time limit before meeting all of the requirements of the JFPA.

Included in the JFPA is a provision to allow the Commission to begin a proceeding to determine if a limit should be placed on the EBR three months after enactment of the JFPA. However the language specifically states that **before** the establishment of any limit the Commission **shall** follow four steps to:

- (I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;
- (II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;
- (III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and
- (IV) determine whether with respect to small businesses, the costs would not be unduly burdensome;

IFDA sees no evidence that any of these steps have been taken in the NPRM, and therefore believes it is premature to move onto any discussion of an EBR time frame in the final implementing regulations.

Moreover IFDA emphasizes that the FCC cannot cite comments received in response to this NPRM as sufficient to satisfy these statutory requirements. Before it can place any time limit on the EBR exemption, the FCC must perform a separate analysis to meet the four requirements of the statute. If, after this analysis the FCC determines that these issues warrant further examination, the Commission should then begin a new notice and comment rulemaking effort. This will allow stakeholders the opportunity to examine

the data from the Commission and provide their views regarding the necessity of a time limit and what that time limit should be. As stated earlier, the FCC has not identified any complaints regarding unsolicited faxes sent under the EBR exemption. Until it is clear that such complaints exist and the FCC meets the requirements of the JFPA, any discussion of an EBR time frame in these regulations should be prohibited.

A second issue of importance to IFDA is the issue of a “cost-free” opt-out mechanism. The Commission first requests comment regarding the need to enumerate allowable mechanisms. On this issue, IFDA regards the phrase cost-free as self-evident. A mechanism that allows recipients to opt-out at no cost from receiving future faxes is by definition cost-free. Email addresses and websites, both of which may be accessed by computers for free at locations such as public libraries would meet the definition of cost-free as would a more expensive toll-free telephone number. IFDA sees no need for the Commission to regulate further on this issue. If the Commission does see reason to enumerate permissible methods, IFDA strongly endorses the view that email and web-based mechanisms are acceptable.

JFPA also authorizes the Commission to exempt small businesses from the cost-free mechanism requirement and IFDA urges the Commission to provide such an exemption. The definition of a small business in the wholesale distribution trade used by the Small Business Administration is any company with less than 100 employees, which IFDA believes is a suitable threshold.

IFDA also would urge the commission to grant an exemption from the opt-out notice for tax-exempt nonprofit trade associations or membership organizations as authorized by the JFPA. The law stipulates that the FCC has the ability to grant such an exemption if it determines that opt-out language is not required to protect the ability of members of these associations to prevent receiving future faxes. IFDA believes the voluntary act of joining such an organization would provide sufficient proof that members have the knowledge and ability regarding how to contact the organization in order to stop the receipt of future faxes.

On other issues raised by the NPRM, IFDA would issue a blanket charge to the Commission that the regulations should refrain from imposing any additional regulatory mandates beyond those specifically outlined in the JFPA. As an example, the Commission requests guidance regarding what is considered “clear and conspicuous” regarding opt-out language. IFDA sees no reason the FCC should prescribe a specific appearance or language, and thereby place a further requirement on business. The statutory language is sufficient. The same rule would apply for the request regarding the period of

time senders of faxes have to comply with requests not to receive future faxes. IFDA sees no reason to impose a stronger regulatory regime beyond the one specified by Congress which is a period of no more than thirty days.

One issue that IFDA would hope the Commission would address, however, is consumer responsibility with regard to the opt-out. IFDA member companies have a variety of points of contact with their customers, from drivers to salespeople to customer service agents. While distributors work hard to meet a request for removal from fax lists received through any channel, they should not be held legally liable unless the opt-out request has been received through the mechanism specified by the company on the opt-out notice. Companies should not have a legal responsibility for further faxes unless the customer has followed the requested procedure for removal.

In conclusion, IFDA believes the JFPA was the result of a thorough legislative process that took great pains to balance the interests of both consumers and businesses. The Commission is urged to tread carefully in the writing of the implementing regulations. IFDA members and all legitimate businesses take their responsibilities to their customers very seriously. They work very hard to prevent activities that could negatively impact the ability of their business to make a sale, such as angering customers by continuing to send unsolicited faxes after the request to stop has been made. At the same time, businesses should have the ability to freely communicate with customers or potential customers with a minimum of government interference. The JFPA as written strikes the proper balance between consumer rights and business needs.